APPENDIX A

COURT'S CHARGE TO THE JURY

(Reporter's Transcript, pp. 596-620)

THE COURT: Be seated, please.

Lady and gentlemen of the jury: you have heard all of the evidence in the case and the argument of counsel. It is now my duty to charge you upon the duties you are to perform as jurors in this case. You are the triers of the facts, and it is my duty to instruct you upon the law and by these instructions you are bound.

Most of this charge will be read from notes and books that I have before me, but I want you to consider that this is an oral charge and I ask that you pay close attention.

This case will be submitted to you under the provisions of Rule 49(a) of the Federal Rules of Civil Procedure. It is the prerogative of the Court to submit the case to the jury for a general verdict or for special verdicts upon interrogatories, and it is my considered judgment that this is a case which should be submitted upon interrogatories. I will submit to you written interrogatories susceptible of categorical or other brief answers, and I will give you such explanations and instructions concerning the matters thus submitted as may be necessary to enable you to make your findings upon each issue. I will submit to you for your verdicts the controlling controverted fact issues raised by the pleadings and the evidence. The interrogatories propounded to you are in writing and spaces are provided in which you will write your verdicts. You will take the written interrogatories and the

forms prepared for your verdicts with you to the jury room.

In considering and arriving at your verdict, you are instructed that the plaintiff, Lester Nehring, has the burden of proof in the case as to the interrogatories submitted; that is to say, the burden of going forward and establishing by a preponderance of the evidence the matters and facts upon which the plaintiff relies to establish his right to recover.

My statement about the burden of proof being upon the plaintiff, Lester Nehring, is true except for the last two interrogatories, they being interrogatories numbers Six and Seven. These interrogatories relate to the action of the defendant ship owner against the third party defendant, Strahan Shipping Company, and as to those two interrogatories the burden of proof is upon the third party plaintiff, the ship owner, by name Empresa Lineas Maritimas Argentinas.

By "preponderance of the evidence" is meant the greater weight and degree of credible evidence before you. It means that evidence which, considered in the light of all the facts and circumstances, you believe has the greater weight. It does not necessarily mean the greater number of witnesses.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony. In analyzing and considering and weighing and finally determining what are the true facts you have the right, and you alone have the right, to accept as true or reject as false, in whole or in part, the testimony of each and every witness who has appeared before you.

The analyzing and considering and weighing of the evidence presented to you in the trial of this case and the determining of your verdict in this case is your high duty and grave responsibility, not that of anyone except you twelve jurors to whom these interrogatories are submitted, not that of the Court or the lawyers or anyone else, just you twelve jurors alone.

Let me repeat that you are the exclusive judges of the facts proved and of the credibility of the witnesses and of the weight to be given to their testimony. You are entitled to weigh their evidence by any fair standard, that is to say, you are entitled to judge to what extent you believe or credit their evidence or testimony, including the exhibits. You are entitled to consider their appearance and their attitude, their demeanor on the witness stand and the way they looked when they testified. You are entitled to consider any interest the witness may have in the case.

By the term "negligence" as used in this charge is meant the failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

Since a corporation can act only through its officers or employees or other agents, the burden is upon the plaintiff to establish by a preponderance of the evidence in the case that the negligence of one or more officers or employees of the defendant was a proximate cause of any injury and consequent damage sustained by plaintiff. Any negligent act or omission of an officer or employee of a

corporation in the performance of his duties is held in law to be negligence of the corporation.

By the term "unseaworthy" is meant that the vessel or its appurtenances are or is not reasonably suited to the purpose for which it is intended. You are instructed that the existence of an unseaworthy condition in the vessel or its appurtenances does not make the ship owner liable for an accident unless the accident was actually caused by the unseaworthy condition. The mere existence of an unseaworthy condition does not impose liability.

The terms "negligence" and "unseaworthy" are different and should be distinguished from each other. By the term "negligence" as used in this charge is meant the failure to do that which a person of ordinary prudence in the exercise of ordinary care would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence in the exercise of ordinary care would not do under the same or similar circumstances.

By the term "unseaworthy" is meant that the ship or some part thereof or the equipment or tools used to do the work aboard her is not reasonably fit for the purpose for which it is intended. A ship or her appurtenances may be unseaworthy without it being the fault of anyone, as negligence is not prerequisite of the determination of whether or not the vessel or its equipment is unseaworthy.

By the term "proximate cause" as used in this charge is meant that cause which, unbroken by any new and independent cause, produces an event and without which the event would not have occurred. To be a proximate cause of an event it should be reasonably anticipated and

foreseen by a person of ordinary prudence in the exercise of ordinary care that such event or some similar event would result from such cause as a natural and probable consequence.

By the term "new and independent cause", as used in the definition of proximate cause, is meant the act or omission of a separate or independent agency which destroys the causal connection between the negligent act or omission of the party charged therewith and the event complained of, and thereby becomes in itself the immediate cause of such event.

This does not mean that the law recognizes only one proximate cause of an injury consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause an injury and in such a case each may be a proximate cause. It is the duty of the ship owner to furnish a seaworthy vessel and equipment and also to furnish its employees and others employed thereon with a reasonably safe place in which to work.

It is the duty of a longshoreman to exercise ordinary care for his own safety under the circumstances. The owner is not obligated to furnish an accident-free ship. The duty to furnish a seaworthy ship and the appurtenances is absolute, but it is the duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, not a ship that will weather every conceivable storm or stand every imaginable peril of the sea, but a vessel reasonably suited for the intended service.

The plaintiff in his suit against the ship owner is seeking to recover damages for personal injuries allegedly caused by an unseaworthy ship. Plaintiff's claim is based on two general grounds: one, of unseaworthiness; and, two, of negligence. Regarding the claim of unseaworthiness, you are instructed that the ship owner is under a non-delegable continuing duty to the plaintiff to furnish and to keep in order a seaworthy vessel, tackle, gear and appurtenances. This duty requires that the vessel and its tackle, gear and appurtenances be adequate and reasonably safe for the work being performed thereon.

The Court instructs you that the ship owner is liable to the plaintiff for injuries sustained by him caused or brought about by an unseaworthy condition, as hereinabove defined, even though the steamship company may not be found to be negligent. In other words, there is an absolute liability on the part of the owner or operator of a merchant vessel for injuries sustained by a longshoreman by reason of the unseaworthiness of the vessel or the failure to supply a reasonably safe place in which to work.

It was the continuing duty of the defendant ship owner at the time of the accident in question to use ordinary care under the circumstances in furnishing the plaintiff with reasonably safe equipment and a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances to maintain and keep the place of work and the ship's equipment used in carrying on the work in a reasonably safe condition. This continuing duty to use ordinary care owed by the ship owner to the longshoreman aboard the ship exists independently of and separate from any similar duty owed to the longshoreman by others, including the stevedoring

company as their employer, and cannot be transferred or shifted by the ship owner to anyone else.

Unseaworthiness is a relative concept dependent in each instance upon circumstances in which the ship's fitness is drawn in question. A longshoreman does not assume the risk of injury from negligence of another or from unseaworthiness of the vessel. However, in nearly every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of negligence or unseaworthiness.

There are in effect safety and health regulations of longshoring. These regulations have been promulgated by the United States Department of Labor. They specifically cover various things that characterize the stevedoring industry. The plaintiff claims that one of the regulations has been violated, and he is therefore entitled to have this taken into account by you in evaluating your decision on the merits of his suit.

In this connection I instruct you that the following portion of these regulations are deemed appropriate by the Court, and I now turn to Section 9.91(c), which reads: "Slippery conditions shall be eliminated as they occur."

It is the position of the defendant ship owner that these regulations cover the standard of care imposed on stevedoring companies, and in this connection the Court directs your attention to the following additional provisions, now turning to Section 9.2(a): The responsibility for compliance with the regulations of this part placed upon employees as defined in Section 9.3(c) of this part. (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners,

operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, masters or agents of vessels of responsibilities or duties now placed upon them by the law, regulations or custom."

Contributory negligence is negligence of the plaintiff himself which caused or contributed to cause the accident causing his injuries. Contributory negligence is never assumed, it must be proved, and it is the burden in this case of the defendant to show by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

By the term "contributory negligence" is meant the negligence of the plaintiff himself which entered into and contributed to the accident causing his injury, that is, where the plaintiff himself failed to exercise that degree of care that an ordinarily prudent person acting under the same or similar circumstances would have exercised.

You are instructed that contributory negligence does not defeat the right of a longshoreman to recover damages for an injury he has suffered if his injury is proximately caused in part either by the unseaworthiness or by the negligence of the defendant or its employees.

In considering the defendant's claim that the plaintiff was guilty of contributory negligence, you will bear in mind that the plaintiff is not chargeable with any negligent conduct of his employer, the stevedoring company, or any of his fellow employees. The plaintiff is only chargeable with his own conduct, so in connection with the defendant's claim of contributory negligence you will consider only what the plaintiff himself did or failed to do at the time of and immediately before the accident.

If you find that the plaintiff, Lester Nehring, is entitled to recover damages but that his injury was also proximately caused in whole or in part by his own contributory negligence, then you will determine the extent to which his contributory negligence contributed to his injury and state the extent to which it contributed in terms of percentage in the space indicated on the answer sheet. In the event of such finding by you, you will not make any reduction in the amount of damages which you may find he has sustained, but you will simply find the amount of damages without regard to contributory negligence and then state the percentage to which such injury producing the damage was caused by his contributory negligence.

In arriving at and assessing the damages to which plaintiff is entitled, if any, you will award only such sum of money, if now paid in cash, as would fairly and reasonably compensate him for such damages as you find he has suffered as a direct and proximate result of the accident in question, taking into consideration the following elements of damage and none other:

(1) Such physical pain, if any, as you find from a preponderance of the evidence, plaintiff Nehring has suffered from the date of the occurrence of January 9, 1964, made the basis of this suit, to the date of this trial, directly and proximately caused by the injury suffered by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(2) Such mental anguish, if any, as you may find from a preponderance of the evidence he has suffered from the date of the occurrence of January 9, 1964, made the basis of this suit, to the date of this trial, directly and proximately caused by the injury suffered

by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(3) Such physical pain, if any, as you may find from a preponderance of the evidence he will in reasonable probability suffer in the future beyond this date, directly and proximately caused by the injury sustained by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(4) Such mental anguish, if any, as you may find from a preponderance of the evidence he will in reasonable probability suffer in the future beyond this date, directly and proximately caused by the injury sustained by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(5) The reasonable present cash value of such loss of earnings, if any, of the plaintiff Lester Nehring, as you may find from a preponderance of the evidence he has sustained since the date of the injury to the date of this trial, directly and proximately caused by the injury suffered by him as a direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

(6) The reasonable cash value of loss, if any, of earning capacity of plaintiff as you may find from a preponderance of the evidence he will in reasonable probability sustain in the future beyond this date, directly and proximately caused by the injury suffered by him as the direct and proximate result of the occurrence of January 9, 1964, made the basis of this suit.

I will now read to you the interrogatories which are submitted to you for your verdicts. They are in writing

and spaces are provided in which you will write your answers. These interrogatories are numbered 1 through 7, but some of them contain subsections, so I believe if you answer all of the questions that are submitted there will be 17 questions in all to be answered by the jury.

I will now read them to you, omitting the caption.

Interrogatory No. 1: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?"

And you will answer the question "yes" or "no".

In each case there is a space provided in which you will write your answer.

"If you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories, but if you answer Interrogatory No. 1 in the affirmative, the following interrogatories will be answered.

"Interrogatory No. 2: (a) Was the RIO BERMEJO unseaworthy, as that term has been explained to you in the Court's charge, at the time of plaintiff's injury?"

You will answer "yes" or "no", as you find from the evidence.

Part (b): "If you have answered the foregoing interrogatory in the affirmative, was the unseaworthy condition of the RIO BERMEJO a proximate cause, in whole or in part, of the injury sustained by the plaintiff?"

You will answer the question "yes" or "no".

Interrogatory No. 3: "(a) Was the defendant ship owner, its master, agents, servants, or employees, negligent in any respect?"

You will answer "yes" or "no".

"(b) If you have answered the foregoing interrogatory in the affirmative, then state fully and in detail in what manner and respect it was negligent."

You will note there is a space left in which you will write your answer. If you find that you need additional space you may write on the back of the sheet or use another sheet of paper, as you wish.

Part (c): "If you have answered Interrogatory 3(a) in the affirmative, was such negligence, in whole or in part, a proximate cause of the injury sustained by plaintiff?"

You will answer "yes" or "no".

Interrogatory No. 4: "(a) Was the plaintiff, Lester Nehring, negligent in any respect?"

You will answer "yes" or "no".

"(b) If you have answered that he was negligent, then state fully and in detail in what manner and respect he was negligent."

Again, there is a space provided in which you will write your answer.

"(c) If you have answered that plaintiff was negligent, was his negligence, in whole or in part, a proximate cause of the injury sustained by him?"

You will answer "yes" or "no".

"(d) If you have answered the plaintiff was negligent and that his negligence was a proximate cause, in whole or in part, of the injury sustained by him, to what extent

did such negligence on the part of plaintiff cause or contribute to cause the accident in question?"

You will answer by stating the percentage.

Interrogatory No. 5: "What amount of money, if now paid in cash, will fairly and reasonably compensate the plaintiff, Lester Nehring, for the injury sustained by him on January 9, 1964?"

"You will answer by stating the amount in dollars and cents."

As I stated earlier, the next two interrogatories, numbers 6 and 7, relate to the controversy between the defendant Impresa Lineas Maritimas Argentinas, and the third party defendant Strahan Shipping Company, and as stated earlier the burden of proof to establish the affirmative of Interrogatory No. 6 and No. 7 is upon the defendant and third party plaintiff Empresa Lineas Maritimas Argentinas.

Interrogatory No. 6: "(a) Did the stevedoring company, Strahan Shipping Company, fail to perform its stevedoring work aboard the RIO BERMEJO in a reasonably safe and workmanlike manner?"

And you will answer "yes" or "no", as you so find.

"(b) If you have answered Interrogatory No. 6(a) in the negative, you need not answer the following interrogatories. If you have answered Interrogatory No. 6(a) in the affirmative, then state fully and in detail in what manner and respect the stevedoring company failed to do its work in a reasonably safe and workmanlike manner."

Again, there is a space provided in which you will write your answer.

"(c) If you have answered Interrogatory No. 6(a) in the affirmative, was such conduct a proximate cause of the injury sustained by plaintiff?"

You will answer the question "yes" or "no", as you so find.

Interrogatory No. 7: "(a) Was the defendant ship owner, its master, servants, agents or employees, guilty of conduct which would preclude the ship owner from recovering indemnity from the stevedoring company, Strahan Shipping Company?"

You will answer "yes" or "no", as you so find.

"(b) If you have answered Interrogatory No. 7(a) in the negative, you need not answer the following interrogatories. If you have answered Interrogatory No. 7(a) in the affirmative, then state fully and in detail in what manner and respect its conduct was sufficient to preclude indemnity."

Again there is a space provided in which you will write your answer.

And, finally, part (c): "If you have answered Interrogatory No. 7(a) in the affirmative, was such conduct a proximate cause of the injury sustained by plaintiff?"

You will answer "yes" or "no".

At the end is a line for the signature of the foreman of the jury and a date line for your verdicts to be dated.

Now, on the issues existing between the ship owner and the stevedoring company, you are charged that the ship owner owes a duty to longshoremen, but not to the stevedoring company, to furnish a seaworthy vessel and equip-

ment. It also owes the longshoremen the duty of providing a reasonably safe place in which to work.

The Court instructs you that Strahan Shipping Company was an independent stevedoring contractor, employed to discharge the cargo from the RIO BERMEJO. Under the law, the stevedore impliedly warrants that it will perform said service in a workmanlike manner, and the stevedoring contractor is liable to indemnify the ship owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of said contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as well as to the use of the vessel's equipment and working areas incident to the performance of the stevedoring work. The warranty is breached when the stevedoring contractor conducted its operations in a substandard manner, thereby bringing into play the vessel's unseaworthiness.

If the stevedoring contractor, through its employees, fails to exercise reasonable care in conducting its unloading operations and as a result thereof brings into play an unseaworthy condition of the vessel, for which the vessel is liable in damages to an injured longshoreman, the vessel owner is entitled to indemnity from the stevedoring contractor, because its negligence, which brings the unseaworthiness of the vessel into play, amounts to a breach of the warranty of workmanlike service owed by the stevedoring contractor to the vessel owner.

I have charged you that the ship owner is not a guarantor or an insurer of the safety of the longshoremen and that the extent of the ship owner's duty is only to exercise ordinary care under all of the circumstances.

Likewise, the stevedoring company is not a guarantor or an insurer of the safety of the longshoremen and the extent of the stevedoring company's duty to the ship owner is only to exercise reasonable care under all of the circumstances.

In answering Interrogatory No. 6, which asks whether the stevedoring company performed its work in a reasonably safe and workmanlike manner, you will consider only the duties owed by the stevedoring company to the steamship company and not consider for any purpose the duties owed by the stevedoring company to the plaintiff.

There is no duty on the part of the ship owner to give the stevedoring company notice of a danger which is obvious or of a danger which should have been obvious to a company exercising ordinary care under the circumstances. However, in the absence of appearances that caution it or would caution a reasonably prudent person under like circumstances, the stevedoring company was entitled to assume that its place of work aboard the ship and the stowed cargo was reasonably safe under all of the surrounding circumstances.

If you have answered parts (a), (b) and (c) of Interrogatory 6 in the affirmative, you will then answer Interrogatory No. 7. This interrogatory asks whether or not the ship owner was guilty of any conduct which would preclude the ship owner from recovering indemnity from the stevedoring company. That is, this question asks you whether or not the conduct of the ship owner is such that it should not be permitted to recover from the stevedoring company any sum which it may be obligated to pay the plaintiff Lester Nehring, in addition to its legal fees and expenses pertaining to the defense of Lester Nehring's action.

The burden of proving the ship owner was guilty of such conduct that it would not recover indemnity from the stevedoring company is on the stevedoring company.

The law provides that even though the stevedoring company may have failed to perform its work in a reasonably safe and workmanlike manner to some extent that the ship owner is not entitled to recover any amounts it might have to pay Lester Nehring from the stevedoring company if the ship owner is guilty of conduct of such a nature that it should not be permitted to recover from the stevedoring company.

By the term "conduct of such a nature that it should not be permitted to recover from the stevedoring company" is meant the failure to use that degree of care toward the stevedoring company which would be used by a ship owner of ordinary prudence under the same or similar circumstances. Here again the law uses as its yardstick the conduct of a reasonably prudent ship owner. That does not mean a ship owner that is unduly cautious or unduly careful; it does not mean a ship owner that is reckless; but it is this concept of the reasonably prudent ship owner which you must apply in measuring the conduct of the ship owner toward the stevedoring company in this case in answer to Interrogatory No. 7.

When you arrive at your answers to the questions submitted your verdicts will be signed by your foreman and dated. Your answer to each interrogatory must be unanimous, that is, all 12 members of the jury must agree in order to return any answer or verdict.

You are further instructed that all 12 members of the jury must be present during all of your sessions, discus-

sions and deliberations. If for any reason one or more of you should step out of the jury room all discussions and deliberations should cease until those members have returned and all 12 members of the jury are present.

When you retire to consider your verdicts, you will elect a foreman from among your number. It is my experience that anything that is done by more than one person requires that someone be in charge. Your foreman will be in charge and will preside over all of your sessions, discussions and deliberations, and will be your spokesman in court.

This concludes the charge of the Court in chief. It is provided by the Federal Rules of Civil Procedure that if any party wishes to except or object to the charge as given, or if any party wishes to request that additional charges be given, that any such exceptions, objections or requests may be made out of the presence and hearing of the jury.

I will now ask if there will be any such exceptions, objections or requests, and I will first recognize the plaintiff.

Mr. Roberts: Yes, Your Honor.

The Court: Very well. The jury will be withdrawn.

(Jury leaves the courtroom, and the following proceedings out of the presence and hearing of the jury.)

SUPPLEMENTAL CHARGE

(Reporter's Transcript, pp. 632, 633)

The Court: Very well. Your exception is noted.

Will you bring the jury in, please.

(Proceedings in the presence and hearing of the jury.)

The Court: Lady and gentlemen of the jury: I want to instruct you again, by way of clarification, that unseaworthiness and negligence are separate and independent concepts. You may find one and not the other. Either will support liability of the defendant to the plaintiff.

I instruct you that when you consider proximate cause in connection with unseaworthiness, foreseeability is not to be considered as an element of proximate cause.

The duty of the ship owner to furnish a seaworthy vessel is absolute and does not involve the duty to exercise ordinary care which relates to the negligence theory of recovery only. In other words, the concept of ordinary care does not relate to the unseaworthiness theory. It is to be considered only as an element of your consideration of the issue of negligence.

With those instructions, you may now retire to consider your verdicts. You will take with you the interrogatories with the forms prepared for your verdicts. You will also take with you all exhibits that have been admitted in evidence.